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IN THE  
United States Court of Appeals  
FOR THE NINTH CIRCUIT

LOUIS LEYVA BARRAGAN,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

No. 22,723 ✓

OTILA NAVAIRA-PEREZ,  
*Appellant,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

No. 22,724 ✓

On Appeal From the Judgment of  
The United States District Court  
For the District of Arizona

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BRIEF FOR APPELLEE

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## **II.**

### **ISSUES OF THE CASE**

1. Did the search of Barragan and Mrs. Perez's automobile and purse by Customs Agents at the time they entered the United States from Mexico preclude a subsequent border search fourteen miles north of the border by Customs Agents approximately one hour later?

2. Did the Court err in denying defendants' Motion for a Judgment of Acquittal?

## **III.**

### **JURISDICTIONAL STATEMENT OF FACTS**

This case was begun in the United States District Court for the District of Arizona by the return of an Indictment by the Federal Grand Jury sitting at Tucson, Arizona, on July 19, 1967. The indictment charged the defendants with having received, concealed and facilitated the transportation and concealment of approximately eleven (11) ounces of marijuana in violation of 21 U.S.C. §176a and without having obtained a permit and without having paid the special tax thereon as required by law in violation of 26 U.S.C. §4744(a).

On July 31, 1967, the defendants failed to appear for their arraignment and a bench warrant was issued for their arrest. On the same date, the bench warrant was quashed and defendants' motion for a continuance was granted.

On November 29, 1967, Count II of the Indictment was dismissed and the case proceeded to trial. On November 30, 1967, the jury returned a verdict of guilty as to both defendants.

On December 26, 1967, defendants' Motion for New Trial was denied and both defendants were sentenced to five years imprisonment. Bail on appeal was fixed at \$10,000 for Barragan and \$1,000 for Mrs. Perez.

On March 14, 1968, the United States Court of Appeals for the Ninth Circuit granted defendant Barragan's motion to reduce the appeal bond to a \$1,000 cash bond with additional security consisting of the unencumbered home of his parents valued at \$7,500. Barragan posted the appeal bond on April 19, 1968.

The District Court permitted Mrs. Perez to remain free pending her appeal.

Both defendants were granted leave to appeal in forma pauperis and were provided a transcript of the trial.

The Trial Court had jurisdiction for the trial of the offense by the provisions of 18 U.S.C. Section 3231. This Court has jurisdiction of the appeal by the provisions of 28 U.S.C. Section 1291.

Perez and Barragan have filed separate appeals, but since they were tried together and have raised the same issues, the Government, pursuant to Rule 28(i), Federal Rules of Appellate Procedure, Title 28, U.S.C., is filing one reply brief.

### **Statement of Facts**

Perez and Barragan were first seen at 11:00 p.m. on the 24th of June in a 1959 brown Buick on Canal Street in Nogales, Sonora, Mexico (TR 42). Washington went back to the Grand Avenue Port of Entry and placed a lookout on the vehicle with the inspector on duty. (TR-42) Barragan

and Mrs. Perez were next seen by Agent Washington shortly after midnight on June 25 sitting in the Buick which was parked in front of the El Cubano Bar in Nogales, Sonora, Mexico. (TR-43) Barragan was sitting in the driver's seat and Mrs. Perez was sitting on the passenger side. (TR-43, 44)

At 2:30 a.m. on June 26, 1967, the Buick entered the United States from Mexico and was recognized by Customs Inspector Condez as the vehicle to be on the lookout for. (TR-18, 19) Mrs. Perez was driving the car. (TR-20) Mr. Condez searched the car (TR-21), and Mrs. Perez's purse (TR-33). While searching the car, he saw Mr. Barragan observing the search of the car. (TR-23, 24) from the Mexico side of the border. (TR-28) About 30 seconds to a minute after Mrs. Perez was passed through customs (TR-28), Barragan was searched and allowed to proceed into the United States (TR-30).

While Mrs. Perez's car (TR-204, 205) was being searched Condez had the Customs Agents notified. (TR-21, 22) Agent Washington drove to the port of entry at approximately 2:30 a.m. in the morning. (TR-45) When he arrived he saw the Buick heading north and proceeded to follow it. (TR-45) The Buick stopped at a service station for a minute to a minute and a half and proceeded south. (TR-47). When it came to the Customs compound it made a U-turn and headed north again. (TR-47) The Buick proceeded north for half a mile and made another U-turn and headed south. (TR-47) Washington observed the Buick stop alongside Barragan who was walking on Arroyo Street. (TR-48) Washington drove to the intersection of Arroyo and Grand Avenue where he picked up Agent Cameron and waited for the Buick. (TR-49) Approximately five minutes later the Buick drove by headed north on Grand Avenue. (TR-50) Washington observed three people in the vehicle (TR-50). He followed



the Buick. (TR-50) The Buick proceeded north until it was approximately one and a half miles north of Nogales when it executed a U-turn and headed south on Grand Avenue. (TR-50) Washington did not follow the Buick south but waited in the area where it had made the U-turn. (TR-50) Approximately five or more minutes later the Buick drove by headed north. (TR-51) Washington followed the Buick to Mile Post 14 where it was stopped. (TR-51) Immediately prior to stopping the Buick, Washington turned on his siren and put his lights on high beam. (TR-52) He then observed Barragan, who was in the back seat of the Buick, slide to the right side, or passenger side, of the car. (TR-53) Mrs. Perez was driving the Buick, her daughter, Rita, was sitting on her right and Barragan was in the back seat. (TR-54).

After Washington put his siren and high beams on, he pulled alongside the Buick on the left side. (TR-107) At this time Agent Dennis, who was also following the Buick, moved up close behind it with his high beams on. (TR-107) As the Buick began slowing down, Dennis saw an arm clothed in black come out of the right hand side of the Buick and saw something fly out the window. (TR-107) Barragan was wearing a black suit. (TR-114) Dennis described the object as being approximately two by two by six inches together with what appeared to be a streamer. (TR-108) Dennis stopped his car and searched for the objects. He found a chunk of vegetable substance and a black scarf. (TR-109) The vegetable substance was marijuana. (TR-188). Agent Dennis showed the chunk of vegetable substance and the black scarf to Agent Washington who then placed Barragan, Mrs. Perez, and Rita Perez under arrest. (TR-55)

Barragan was taken to the Customs Agency office where he laid his coat on a desk in order to be fingerprinted. (TR-84, 85) Cameron removed debris from the coat pockets, which was identified as marijuana. (TR-159).

Mrs. Perez testified in her own defense but Barragan did not testify.

#### IV. SUMMARY OF ARGUMENT

1. The search of the defendants and Mrs. Perez's automobile when they entered the United States from Mexico did not preclude a subsequent border search approximately one and one-half hours later and fourteen miles from the border.

2. The Court did not err in denying the Defendants' Motion for Judgment of Acquittal.

#### V. ARGUMENT

**1. The search of the defendants and Mrs. Perez's automobile when they entered the United States from Mexico did not preclude a subsequent border search approximately one and one-half hours later and fourteen miles from the border.**

Appellants Perez and Barragan contend that once they entered the United States after having been searched at the border, the protection of the Fourth Amendment attached to them and they could only be stopped for a subsequent search if probable cause existed. Suspects are not always immune from examination by Customs Agents merely because they may momentarily escape detection and pass safely through the first customs check. *Thomas vs. United States*, 372 F.2d 252, 255 (5th Cir. 1967); *United States vs. Rodriguez*, 195

F. Supp. 513, 516 (S.D. Texas, 1960), aff'd, 292 F.2nd 709 (5th Cir. 1961).

In *Thomas vs. United States*, supra, Thomas was stopped and searched in El Paso within a period of one and one-half hours at most, after his return to the United States and within a distance of six blocks from the border. Thomas maintained that his entry into the United States was complete prior to his search and that the search was without probable cause. The Court held that under the circumstances of the case, the examination of Thomas at the border line did not in and of itself preclude further use of a border search. The Court stated that the time, within 1½ hours after Thomas entered the United States, and the distance, six blocks from the border, suggest that the search qualified as a border search. *Thomas vs. United States*, supra, at page 255.

It may be argued that *Thomas* can be distinguished from the present case since Thomas was treated like any tourist when he entered the United States, while Mrs. Perez's automobile and purse were searched when she crossed the border and Barragan was searched when he entered the United States. This would not be a valid distinction since in both cases the defendants were not thoroughly or completely searched when they entered the United States. Only Mrs. Perez's purse was searched and not her person; only Barragan's pockets and ankles were inspected for contraband. Neither defendant was required to remove all their clothing. *Murgia vs. United States*, 285 F.2d 14, 16 (9th Cir. 1960). Neither was a complete inspection made of Mrs. Perez's automobile. The hub caps were not removed, or the door panels removed, nor were the seats taken apart. The search of the automobile can be described as a thorough exterior check.

The fact that in the present case the post-entry search was

made fourteen miles from the border as compared with six blocks in *Thomas* does not affect the search as a border search since border searches have been held to be valid border searches twenty miles from the border. *Rodriguez-Gonzalez vs. United States*, 378 F.2d 256, (9th Cir. 1967).

Nor does the fact that the Perez automobile was not in constant surveillance invalidate the search as a border search. *Alexander vs. United States*, 362 F.2d 379 (9th Cir. 1966), Cert. denied 87 S.Ct. 519.

As was stated in the *Thomas* case at page 254, ". . . there must come a point when a traveler's entry into this country is complete so that the protection of the Fourth Amendment attaches to him." Under the circumstances of the present case, that point was not reached prior to the Custom Agents stopping Mrs. Perez's automobile fourteen miles north of the border. These circumstances are as follows:

(1) After Mrs. Perez left the customs compound, she drove north to a filling station where she stopped for a minute to a minute and a half. She then proceeded south from the filling station to the customs compound where she made a U-turn and proceeded north.

(2) After proceeding north for about one-half mile, she made another U-turn.

(3) Mrs. Perez then stopped the car alongside Barragan. At this time the car was headed south.

(4) To this point, Custom Agent Washington had Mrs. Perez under surveillance from the time she left the compound until she stopped alongside Barragan, at which point he did not follow the car north. About five min-

utes later he observed Mrs. Perez heading north on Grand Avenue. At this time Washington noticed that there were now three people in the car where there had been two previously.

(5) The car proceeded north until it was approximately one and one-half miles north of Nogales, when it again executed a U-turn and headed south on Grand Avenue.

(6) Agent Washington did not follow Mrs. Perez as she drove south but waited in the area of the U-turn.

(7) About five minutes later Mrs. Perez was seen heading north on Grand Avenue. She was followed to a point fourteen miles north of Nogales where her car was stopped.

(8) The foregoing events occurred between the hours of 2:30 a.m. and 3:00 a.m. on June 26, 1967.

(9) Agent Washington had seen Barragan and Mrs. Perez together in Nogales, Sonora on June 24, 1967, (TR-42) and again shortly after midnight on June 25, 1967, in Nogales, Sonora, Mexico. (TR-43).

These circumstances may be considered with the fact that it is common knowledge that large quantities of narcotics are smuggled across the Mexican border daily. *Thomas vs. United States*, supra, page 254, note 4.

## **2. The Court did not err in denying defendants' Motion for Judgment of Acquittal.**

Appellant Perez contends that there was insufficient evidence for the charge against her to go to the jury. A Motion

for Judgment of Acquittal was made at the conclusion of the Government's case and after both sides had rested. (TR-161-243).

In its case in chief, the Government proved that Mrs. Perez was with Barragan on two occasions in Nogales, Sonora, Mexico (TR-42, 43), that Mrs. Perez entered the United States with her daughter in a Buick automobile at approximately 2:30 a.m. (TR-18, 19, 20), that while Mrs. Perez's automobile was being searched Barragan was watching from the Mexico side of the border. (TR-23, 24). About 30 seconds after Mrs. Perez was passed through Customs, Barragan appeared at the port of entry on foot. (TR-30) Mrs. Perez proceeded north from the port of entry, then south, then north, then south again when she picked up Barragan (TR-45, 47, 48). She drove south after picking up Barragan and then headed north for one and one-half miles where it made a U-turn and headed south. It subsequently changed direction and headed north (TR-51). When the Buick was stopped by the customs agents, marijuana and a scarf were thrown from the vehicle by Barragan while the Buick was slowing down. (TR-107, 108, 158). These events, occurring where they did and when they did, were sufficient for the jury to conclude that Mrs. Perez and Barragan were associated in committing the offense charged in the Indictment.

Mrs. Perez testified in her defense. She stated that she drove to Nogales to attend a wedding (TR-201), but only attended the wedding dance (TR-202). She did not remember the last name of the woman who had invited her to her wedding (TR-201). When asked if she knew Barragan before she saw him at the wedding dance she answered, "I was acquainted with him but not for a long time. I hadn't known him." (TR-222, lines 8 through 21). She was at the El Cubano Bar and Lasita with Barragan (TR-224, 225). Bar-

ragan never sat behind the driver's seat (TR-237). She further testified that it was a cold night (TR-235), but that Barragan took his coat off and hung it on a hook in the car (TR-214), where it was when he got out of the car at Mile Post 14 (TR-215). When asked if she made any U-turns after Mr. Barragan got into her car, she said no. (TR-236). Barragan had no suitcase with him when she picked him up to drive him to Phoenix (TR-235). The jury apparently believed the testimony and found the rest of her testimony unbelievable. The Government's case was strengthened by the testimony of Mrs. Perez and the defendants' motion for a judgment of acquittal was properly denied.

## VI. CONCLUSION

Mrs. Perez and Barragan were stopped as part of a lawful border search and arrested as a result of, and only after, evidence which they discarded had been found without a search; and which evidence created probable cause for their arrest.

Respectfully submitted,

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